In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 740

MORAN TOWING & TRANSPORTATION CO., INC.,
PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, ETC., UNITED STATES OF AMERICA, AND MOBILE TOWING AND WRECKING CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings and conclusions of the District Court for the Southern District of Alabama (R. 545-558) are not reported. The opinion of the Court of Appeals for the Fifth Circuit (R. 594-600) is reported at 194 F. 2d 629.

JURISDICTION

The judgment of the Court of Appeals (R. 601) was entered on February 21, 1952. A petition for

rehearing, filed on March 11, 1952 (R. 602), was denied on April 1, 1952 (R. 606). The petition for a writ of certiorari was filed on April 29, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals erred in adopting the findings of the District Court that, in the circumstances of this case, a collision between two ships, one of which was in tow of petitioner's tug, was caused by the concurrent negligence of all three vessels.

STATEMENT

This case arose out of a collision between the S.S. *Caloria,* a public vessel owned and operated by the United States, and the S.S. *San Benito,* operated by respondent Empresa Hondurena de Vapores, in the channel of Mobile Bay. The *Caloria* was a "dead ship" with locked steering gear and manned only by a "riding crew" (R. 556). She was being towed by petitioner's tug *Margot Moran* with respondent Mobile Towing and Wrecking Company's tug *Ernest F. Ladd* lashed to her after starboard quarter to steer her (R. 545, 548-549).

The *San Benito* was proceeding southward down the channel from Mobile toward the sea. Petitioner's tug *Margot Moran,* with the *Caloria* in tow, was proceeding northward up the channel (R. 547-548). The *San Benito* and petitioner's tug sighted

each other and agreed to a port-to-port passing. The *San Benito* passed the *Moran* safely but collided with the *Caloria.*

Libels, cross-libels, and impleading petitions under Admiralty Rule 56[1] brought the operators of all the vessels before the District Court as adversary to each other (R. 545-546, 10, 26, 53, 57, 81). Upon a trial, some oral testimony (R. 123-133, 140-170) and much evidence in deposition form were taken (R. 171-544). The District Court, upon conflicting evidence (R. 547), proceeded to determine liability as follows: it first absolved the steering tug *Ladd* from all liability on the ground that the *Ladd* was under orders of the *Caloria* and carried out these orders without negligence (R. 557). Next, it determined that, as between the flotilla of tugs and tow and the *San Benito,* both were at fault in "that neither the flotilla nor the 'San Benito' began their efforts to effect a safe clearance in sufficient time before they met" (R. 555). Finally, it concluded, in allocating the flotilla's fault between petitioner's tug and the *Caloria,* that both were negligent (R. 558). It divided the damages equally between the *San Benito* and the flotilla,

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[1] "In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libellant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. * * *"

and divided the flotilla's share equally between the *Moran* and the *Caloria*.

On appeal by all three aggrieved parties, the Court of Appeals, modifying the judgment to apportion the damages one-third each to the three negligent vessels,[2] affirmed. It concluded that, since the evidence was in conflict and the district judge had broad experience, including personal knowledge of the waters where the collision occurred, it should accept his findings (R. 600).

ARGUMENT

Reduced to essentials, petitioner's challenge to the judgment below amounts to an attack on the concurrent determination of negligence by the two courts below and, as such, must be unsuccessful in admiralty as it would be in a civil action. See *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, 98-99, and cases cited. The ultimate issue sought to be raised is whether petitioner's tug was negligent. We think that the court below committed no error in adopting the District Court's finding that it was. And that finding, sustained by the record, presents no occasion for further review by this Court.

1. Petitioner's contention that the court below should not have adopted the District Court's findings is unfounded. No rule of law requires the Courts of Appeals to deny weight to a district

[2] *The Eugene F. Moran*, 212 U.S. 466. No issue is presented here as to the propriety of the modification.

court's findings in admiralty, any more than in civil actions. On the contrary, it is settled that, at least where the findings are based upon the trial judge's evaluation of oral testimony, they may not be set aside unless clearly erroneous (see, *e.g.*, L. Hand, J. in *Petterson Lighterage & T. Corp.* v. *New York C.R. Co.*, 126 F. 2d 992 (C.A. 2), and cases cited); and if the Courts of Appeals may in proper circumstances refuse weight to findings based on evidence in deposition form (but see, *e.g.*, *Maryland for use of Johnson* v. *United States*, 165 F. 2d 911, 914 (C.A. 4); *Rathbun* v. *Halvorson*, 181 F. 2d 57, 58 (C.A. 5)), there is certainly no rule which requires them to do so when the findings are adequately supported by the record. The appellate court may, of course, adopt the district court's view of the evidence.

There is no basis for the suggestion (Pet. 4) that the court below adopted the trial judge's findings "although apparently not concurring" in them. The Court of Appeals did observe (R. 600) that "the record presents a picture of conflicts which make it difficult to draw from it the true picture of what occurred." It concluded, however, not that the District Court's resolution of these conflicts was unreliable, but that the trial judge's findings and conclusions, showing "a profound and careful study of the record and a thorough and complete mastery of it," plainly warranted affirmance.

2. Petitioner contends (Pet. 5) that the attribution of negligence to the *Moran* was erroneous because it had made a safe passing before the collision with its tow occurred, arguing that in such circumstances the tug may not be held liable "because of the tow's failure to steer in the wake of the tug * * *." This argument would be pertinent if the negligence of the flotilla had consisted, as petitioner alleges (Pet. 2, 8), in the *Caloria's* failure to steer in the wake of the tug. The District Court found, however, that tug and tow were both negligent in failing "to discharge their combined duty to get the 'Caloria' over on the eastern side of the channel before passing" (R. 558, 555, 556).

This finding makes it clear that the tug was partly at fault. It supplied the motive power, and only it was capable of beginning an earlier move to starboard, which the judge found was required. He found, moreover, that the slackening of the hawser of a "light" ship, riding high in the water, which was caused by the tug's action in reducing speed (see R. 549), increased the inability of the *Caloria* to steer to the eastward (R. 556). Thus petitioner's vessel was chiefly, or at least partly, at fault in the negligent navigation of the flotilla, and there is no conflict with cases exonerating the tug where the fault is solely the failure of the tow to steer in the tug's wake and where, unlike the present case, the tug itself has not been negligent.

3. For the same reason there is no conflict with *Stevens* v. *The White City,* 285 U.S. 195. The tug

is here being charged, not with liability as a bailee of the *Caloria,* but with her own negligence toward both her own tow and the *San Benito* in failing to begin clearing soon enough.

CONCLUSION

The petition presents only an attack on concurrent findings of negligence. There is no conflict. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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